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JAMES H. McKENNEY,
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No. 411.

Brf. of Bacon for D. C. to me

Supreme Court of the United States.

Filed Jan. 7, 1901.

October Term, 1900.

CITY OF DETROIT,
THOMAS M. LUCKING, Receiver of Taxes of the City of Detroit, and
WILLIAM B. THOMPSON, Treasurer of the City of Detroit,
Plaintiffs in Error,

vs.

RALZEMOND A. PARKER,
Defendant in Error.

411

BRIEF FOR DEFENDANT IN ERROR ON MOTION FOR ADVANCEMENT OF CAUSE.

ELBRIDGE F. BACON,
Counsel for Defendant in Error.

POTTER PRINTING CO., DETROIT, MICH.

Supreme Court of the United States.

October Term, 1900.

CITY OF DETROIT, THOMAS M. LUCKING, Receiver of Taxes of the City of Detroit, and WILLIAM B. THOMPSON, Treasurer of the City of Detroit, *Plaintiffs in Error,* *vs.* RALZEMOND A. PARKER, *Defendant in Error.*	

BRIEF FOR DEFENDANT IN ERROR ON MOTION FOR ADVANCEMENT OF CAUSE.

The defendant in error comes by Elbridge F. Bacon, his counsel, and joins with the plaintiffs in error in asking that this cause be advanced on the call and order of the docket.

This case, as is stated in the brief of plaintiffs in error, is of great public interest, not only to the city of Detroit and the cities and villages in the State of Michigan, but

also to the cities and villages of a number of other states which have substantially the same provisions in their charters and laws for levying paving and other assessments by the front foot.

The case of *Webster vs. City of Fargo*, which was appealed from the Supreme Court of North Dakota, and the case of *Lyon vs. Tonawanda*, which was appealed from the Circuit Court of the United States for the Northern District of New York, are both on the docket of this Court for the present term, and involve the same questions as this case.

We are also informed that the case of *French vs. Barber Asphalt Company*, which is a suit between private parties, and was appealed from the decision of the Supreme Court of Missouri, rendered in November, 1900, subsequent to the appeal in this case, and which involves, to a certain extent, the same questions as this case, has been advanced and set for hearing on February 25th, 1901.

These four cases involve substantially the same questions, and the parties in all of them desire to be heard before the questions are finally disposed of by this court. We are authorized by the counsel for the plaintiffs in error in the cases of *Webster vs. City of Fargo*, and *Lyon vs. Tonawanda*, to say that they desire to have those cases advanced and heard at the same time with this case.

As these cases involve questions of great public interest, and the effect of the decision of this court will be far reaching, and will dispose of a large number of cases now pending in the different States, we would suggest that all of these cases be set for hearing at the same time as the case of *Barber Asphalt Company vs. French*, and that all the parties interested in these four cases may be represented by counsel and heard at that time.

ELBRIDGE F. BACON,
Counsel for Defendant in Error.

No. 411.

Br. of Bacon for D. & E.

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Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 411.

THE CITY OF DETROIT, THOMAS M. LUCKING, AND WILLIAM B. THOMPSON, APPELLANTS,

vs.

RALZEMOND A. PARKER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

BRIEF OF ELBRIDGE F. BACON, COUNSEL FOR DEFENDANT IN ERROR.

ELBRIDGE F. BACON,
Counsel for Defendant in Error.

FOTHER PRINTING CO., DETROIT, MICH.

(17,898.)

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 411.

THE CITY OF DETROIT, THOMAS M. LUCKING, AND WILLIAM B. THOMPSON, APPELLANTS,

vs.

RALZEMOND A. PARKER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

BRIEF OF ELBRIDGE F. BACON, COUNSEL FOR DEFENDANT IN ERROR.

STATEMENT OF CASE.

This case was brought by complainant to set aside certain assessments and sales of his land for paving Woodward and Blaine avenues, in the City of Detroit.

The property consists of a house and lot situated on the south-west corner of Woodward and Blaine avenues, in the City of Detroit, having a frontage on Woodward avenue of 68.89 feet, and extending west on Blaine avenue 200 feet.

This property is worth upwards of ten thousand dollars, and has a rental value of eight hundred dollars per year.

In 1893, the Common Council of the City of Detroit caused Woodward avenue to be paved 70 feet wide, with asphalt, at a total expense of $55,634.78, all of which, except the cost of paving intersections of streets and alleys, was assessed on the property abutting upon that part of Woodward avenue paved, pro rata, according to frontage.

The amount assessed on complainant's lot was $491.44, being at the rate of about $7.00 per foot front.

March 25th, 1897, this lot was sold for the taxes assessed for paving Woodward avenue, and bid off to the City of Detroit for ninety-nine years. Redemption from the sale expired March 25th, 1898, and the city now claims the title to said lot under said sale for a period of ninety-nine years.

In 1896, the Common Council of the City of Detroit, to pave Blaine, caused Blaine avenue to be paved at a total expense of $11,462.32, all of which, except the cost of paving intersections of streets and alleys, was assessed on the property abutting on that part of Blaine avenue paved, pro rata, according to the frontage thereof.

Complainant's lot fronted on Blaine avenue 200 feet, and was assessed for $442.68, being at the rate of $2.20 per foot front. All the other lots fronting on Blaine avenue, except the complainant's, were 127 1-2 feet in depth, and had a frontage varying from 40 to 50 feet.

Complainant's lot was afterwards sold for paving Blaine avenue, and bid off to the City of Detroit for ninety nine years. Redemption has expired, and the city now claims title to said lot under said sale.

This case was heard before Judge Swan, and decree entered vacating the sale of complainant's land for said assessments, and setting aside the taxes, on the ground that the charter and ordinances of the City of Detroit, providing for the assessment of paving taxes, deprived the complainant of property without due process of law, and were in violation of the fourteenth amendment to the Constitution of the United States.

Parker vs. Detroit, 103 Fed. R., 357.

And from this decree the city appealed.

The charter and ordinances of the City of Detroit, so far as they are material to the question in this case are as follows:

Sec. 35 of Chapter XI. of the Charter of the City of Detroit provides:

"The cost and expense of such improvement, except so much thereof as shall be for the work within the lines of intersection of cross-streets and alleys, and for the cross-walks at such intersections, and for repaving streets, avenues and highways, shall be assessed ratably according to their extent of front on the lots, parts of lots or parcels of real estate directly fronting on and within the local assessment district provided. * * * * * * The word 'front,' as used in this act, shall be construed to mean that part of the lot or other parcel of land which directly abuts on that part of the street to be improved."

Sec. 43. "The Board of Assessors shall, when necessary, proceed to make out a list of all the lots or parcels of real estate constituting the local assessment district, as aforesaid, with the name of the owner or occupant of each lot or parcel of real estate, so far as said board can ascertain the same, and also the

length of front of each lot or parcel of real estate fronting directly on such improvement. Such board shall then assess the cost and expenses of the work chargeable as aforesaid upon the property in said list, ratably upon the several lots and parcels of real estate, according to the length of front thereof. When the assessment roll is thus completed, said board shall give notice by at least five publications in the city paper, that such roll is completed and will remain in their office for twelve days from the publication of said notice, for the inspection of all concerned. At the expiration of said twelve days said board shall, after any needful revision and correction of such roll, sign the same and report it to the common council. Said council may then confirm the same, or may, when it shall deem necessary, refer the same back to said board for further revision or correction, and when the same shall be corrected to the satisfaction of said council it shall, by resolution, confirm the same. * * *."

CHAPTER X.

SEC. 11. "The owners or occupants, or parties in interest to any real estate assessed under this chapter, shall be liable to pay every such tax or assessment, and if the same shall not be paid by the first day of February following, or any part thereof, it shall be lawful for the receiver of taxes to cause a notice to be published in the official daily newspaper for the city, once a week for four successive weeks, and posted in three or more public places in each ward, requiring the owners or occupants of, or parties interested in such lands, tenements, hereditaments or premises, to pay such assessment or tax, and that if default be made in making such payment, such real estate shall be sold at public auction, at a day and place to be specified in said notice, for the lowest term of years at which any person shall offer to take the same, in consideration of advancing and paying such assessment or tax, with the additions provided in this act, and the cost and expense of advertising. The common council, in its discretion, may cause said notice, or any part thereof, to be published in a German newspaper in said city."

CHAPTER X.

SEC. 12. "If the owner or occupant of, or parties in interest in such real estate, do not pay such assessment or tax, with costs, additions and charges, within the period above prescribed for the publication of said notice, the said receiver shall have the power, without further notice, to cause such real estate to be sold at public auction, for the lowest term of years at which any person shall offer to take the same, in consideration of advancing such assessment or tax, with the costs, additions and charges, and to direct the execution of a proper certificate of such sale to the purchaser thereof; and if such real estate shall not be redeemed within one year after such sale thereof, as hereinafter provided, the controller shall, in the name of the

city of Detroit, execute and deliver to such purchaser or his assigns, a proper deed for the conveyance of such real estate for the term for which the same was sold; which deed shall be *prima facie* evidence of the regularity of all the proceedings under which the sale was made and said deed was executed, up to the date of such deed. * * *."

CHAPTER X.

SEC. 18. "It shall be the duty of the controller to bid for the corporation at any sale of real estate for assessments or taxes, every lot of land or premises for which no person shall offer to bid. * * * Upon all such bids by the controller, and all bids as aforesaid, to the use and benefit of the corporation, conveyance and certificates of sale may be executed by the controller to the corporation, acknowledged and attested by the city clerk, and recorded in the same manner as provided in other cases of sales for assessments of taxes. * * *."

CHAPTER X.

SEC. 20. "Assessment rolls to defray the expense of construction of lateral sewers, side and cross-walks, paving, grading, macadamizing, graveling or otherwise improving streets, lanes, or alleys, or for defraying the expense of any local improvements properly payable from the proceeds of special assessments, shall be placed in the hands of the receiver of taxes for payment, as may be provided by ordinance or resolution of the common council for the space of thirty days, after which warrants for the collection of the same may be issued, and such proceedings for the collection thereof be had as are or shall be prescribed by law, or by any ordinance or resolution of the common council, and sales of any real or personal estate for any unpaid assessment shall be made in like manner, and with like effect, as in the case of sales for the non-payment of the general tax."

I.

The only theory upon which an assessment for a local improvement can be sustained, is that the property assessed is peculiarly benefited beyond the benefits received by the community at large.

"Special assessments, on the other hand, are made upon the assumption that a portion of the community is to be specially and peculiarly benefited, in the enhancement of the value of property peculiarly situated as regards a contemplated expenditure of public funds; and, in addition to the general levy, they demand that special contributions, in consideration of the special benefit, shall be made by the persons receiving it. The justice of demanding the special contribution is supposed to be evident in the fact that the persons who are to make it, while they

are made to bear the cost of a public work, are at the same time to suffer no pecuniary loss thereby; their property being increased in value by the expenditure to an amount at least equal to the sum they are required to pay."

Cooley on Taxation, 606.

"Special benefits to the property assessed; that is, benefits received by it in addition to those received by the community at large, is the true and only just foundation upon which local assessments can rest, and to the extent of special benefits it is everywhere admitted that the legislature may authorize local taxes or assessments to be made."

2 Dillion's Mun. Corp., Sec. 761.

"Undoubtedly abutting owners may be subjected to special assesments to meet the expenses of opening public highways in front of their property, such assessments, according to well established principles, resting upon the ground that special burdens may be imposed for special or peculiar benefits accruing from puplic improvements."

Norwood vs. Baker, 172 U. S., 269, 278.

"It has been repeatedly held that assessments for local improvements can be sustained only upon the theory that the lands upon which they are laid are specially benefited thereby; that a law authorizing such assessments without reference to benefits, would in its operation take property for public benefit without compensation, or take property from one person for the benefit of another; and any other view would be unconstitutional."

Dietz vs. City of Neenah, 91 Wis., 422, 427.

"The assessment cannot exceed the benefit to be derived from the improvement, for the reason that the only principle upon which such special assessments can be made at all is, that the value of the property is enhanced by the expenditure."

White vs. Saginaw, 67 Mich., 33, 40.

"The sole ground for imposing a part or all of the cost of a public improvement upon one part of a municipality, is that the part burdened with the cost receives corresponding benefits which the general public does not receive."

Detroit vs. Judge of Recorder's Court, 112 Mich., 558.

"The basis upon which an assessment such as that now in controversy is supported, is that of benefit derived to the property assessed by reason of the making of an improvement at once local and public in its character; the amount assessed being, as observed by Mr. Justice Bronson, an equivalent or com-

pensation for the enhanced value which the property of the person assessed has received for the improvement. It is only because of the special benefit received that specific property is taxed for a specific purpose. The assessment upon property is, therefore, laid with reference to the benefit which such property is supposed to receive from the expenditure of the money."

Re Market Street, 49 Cal., 546, 549.

II.

The benefit to property which will authorize a special assessment to be made for a local improvement must be a direct and immediate benefit, and one which increases the market value of the lands.

"It has been said that in assessing benefits the only safe and practicable course, and the one which will do equal justice to all parties, is to consider what will be the influence of the proposed improvement on the market value of the property, what the property is now fairly worth in the market, and what will be its value when the improvement is made."

Cooley on Taxation, 660.

"The rule is well established that in making special assessments for local improvements, the measure of benefits to be assessed is to be determined by the increased market value of the *res* against which the assessment is made."

Rich vs. City of Chicago, 152 Ill., 18, 31.

"The only safe and true course, the one which will do equal justice to all parties, is to consider what will be the influence of the proposed improvement upon the market value of the property, what is it now fairly worth in the market, and what will be its value after the improvement is made."

State vs. Mayor of Newark, 35 N. J. L., 157.

"Assessments for city and village improvements are not regarded as burdens, but as an equivalent or a compensation for the enhanced value which the property of the persons assessed has derived from the improvement."

Hale vs. City of Kenosha, 29 Wis., 599, 606.

"To render the assessment of benefits legal and valid it must appear that the benefit is direct and immediate, and not contingent and remote."

Hartford vs. School Dist., 46 Conn., 462.

"The principle which underlies special assessments is that the value of the property is enhanced to an amount, at least, equal to the assessment. This principle cannot be departed from without taking private property for public use."

Hanscon vs. City of Omaha, 11 Neb., 37.

While the decision in the case of *Norwood vs. Baker*, 172 U. S. 269, is unquestionably a correct statement of the principles underlying and governing special assessments for local improvements, and the case at bar is clearly within and governed by the principles laid down in the case, still, as the extent and effect of that decision is questioned by the counsel for plaintiffs in error, it seems desirable to fully examine the principles upon which these assessments are based and the rights of the taxpayers under said assessments.

It will be observed that there is a marked distinction between the principles which govern the levy of general taxes and those which relate to special assessments for local improvements, and much of the conflict of authorities on these questions arises from the failure to recognize these distinctions, and from applying principles relating solely to general taxes to assessments for local improvements.

Taxes proper, or general taxes, proceed upon the theory that the existence of government is a necessity; that it cannot continue without means to pay its expenses; that for this means it has the right to compel all citizens and property within its limits to contribute, and that for such contribution it renders no return of special benefit to any property, but only secures to the citizen that general benefit which results from protection to his person and property, and the promotion of those various schemes which have for their object the welfare of all.

On the other hand, special assessments, or special taxes, proceed upon the theory that when a local improvement enhances the value of nighboring property, that property, to the extent of the special benefit, should pay for the improvement.

Cooley on Taxation, 606.
Ill. Cent. Ry. Co. vs. Decatur, 147 U. S., 190.
Brooks vs. Baltimore, 48 Ind., 265.
Hale vs. Kenosha, 29 Wis., 599.
Hanscom vs. Omaha, 11 Neb., 37.
Rich vs. Chicago, 152 Ill., 18.
Jenkins vs. Andover, 103 Mass., 94.

III.

The right to levy an assessment for local improvements being based solely upon the benefit to the property assessed, it necessarily follows:

(a) *That property which is not benefited by the improvement cannot be assessed.*

"Legislative power to exact a special tax from a property owner rests upon the fact that there is a betterment of his property to the extent of the cost of the improvement. * *

If assessments are levied where there is no special benefit, the constitutional principle that the taxes shall be uniform and equal is violated, and the statute should fall."

Elliott on Streets, 392, 401.

"In this case it clearly appears that the property of the plaintiffs were in a way benefited by the alleged improvement, and hence there was no foundation for the exercise of discretion on the part of the council in the assessment of such property for its cost or any part thereof. Under such circumstances, the enforcement of the assessment would be taking property without due process of law."

Ore. & Cal. Ry. Co. vs. City of Portland, 25 Ore., 229, 240.

Where the assessment on the property for paving a street was $3000, and it appeared that the lots, after the paving had been completed, were not worth to exceed $1,000, the court say, (page 168): "It is thus seen that while special remuneration has no concern with taxation for general purposes, it is inseparable with the theory which sanctions assessments for local improvements. If the special 'remuneration in the way of benefits' be eliminated, then the improvements are conclusively in the interests of the general public, and the money raised to pay for them is in effect a section of the 'general revenue for the public at large,' levied 'under the guise of local assessments.' This is literally confiscation, which is merely a mode forbidden like every other of taking private property for public purposes without just compensation to the owner."

Zoeller vs. Kellogg, 4 Mo. App., 163.

"It is generally agreed that an assessment levied without regard to actual or probable benefits is unlawful as constituting an attempt to appropriate private property to public uses."

Thomas vs. Garin, 35 Mich., 155, 162.

"It has been repeatedly held that assessments for local im-

provements can be sustained only upon the theory that the lands upon which they are laid are specially benefited thereby; that a law authorizing such assessments, without reference to benefits, would, in its operation, take property for public benefit without compensation, or take property from one person for the benefit of another; and any other view would be unconstitutional."

Dietz vs. City of Neenah, 91 Wis., 432.

(b) *That the assessment can in no case exceed the amount of the special benefits accruing to the property by reason of the improvement.*

"There can be no justification for any proceeding which charges the land with an assessment greater than the benefits. It is a plain case of appropriating private property to public use without compensation * * * * (663). It is clear that any assessment is wrong which charges land with a sum beyond the special benefits received."

Cooley on Taxation, 661.

"The conclusion to be drawn from the main current of decisions may, therefore, be said to be, that notwithstanding some apparent exceptions, local assessments are constitutional only when imposed to pay for local improvements clearly conferring local benefits on the property so assessed, and to the extent of those benefits."

Hare's Am. Const. Law, 390.

"If a municipal corporation sees proper to avail itself of the assessment mode of taxation to pay in whole or in part for local public improvements, and in making such, the property of individuals, owing to its proximity to the improvement, is specially benefited, it is but just that such property should pay toward the cost of the improvement a sum that is equal to the value of the special benefits conferred, for to this extent it is peculiarly benefited over and above that of other individual members of the public * * * * (564). Such assessments can be only constitutional when imposed to pay for local improvements clearly conferring special benefits on the properties assessed, and to the extent of those benefits."

Chamberlain vs. Cleveland, 34 O. St., 551, 561.

"It is a well established doctrine of this court that property can only be assessed for public improvements on the principle of benefits received by the property from the construction of the work, and that the assessment should never exceed the benefits conferred, and it is essential that it shall appear from

the proceedings themselves that such was the principle upon which the assessment was made."

Crawford vs. People, 82 Ill., 557.

"The act in question makes no express allusion to assessment on account of benefit, yet, as we have seen, the right to assess at all depends solely upon benefit, and must be apportioned to and limited by it. An improvement might cost double the benefit to the lands particularly benefited."

Barnes vs. Dyer, 56 Vt., 469, 471.

"Assessments for local improvements can only be constitutional when imposed for improvements clearly conferring special benefits upon the property assessed, and to the extent of those benefits. That an assessment upon an individual for a local improvement which is not grounded upon and measured by the extent of his particular benefit, will be clearly unconstitutional and void. To hold otherwise would sanction the doctrine that one man may be made to pay another's debt, to pay for improvements not upon his own estate, but upon another's."

Dyar vs. Farmington Village, 70 Me., 515, 527.

"Special taxes should be levied only for special benefits conferred upon the property of the individuals taxed, and never for the general benefits received and shared by all the members of the public in general, while the general taxes should be levied only for a public benefit. To levy a special tax upon the property of particular individuals for general revenue purposes would be a violation of section 1, article II., of the constitution. * * * * Only those who can use such sewer or sewers should be specially taxed to pay for their construction or maintenance, and each should be taxed specially only for the amount of the special benefits which the sewer or sewers might confer upon him, and each should be taxed specially precisely in proportion to the benefits which each individually receive."

Gilmore vs. Hertig, 33 Kas., 156, 168.

"The only just rule in such cases is that the cost should be proportioned on each according to benefit to him, and that the cost on no one shall exceed the benefit to him. This is the rule universally recognized."

Gamble vs. McCrady, 75 N. C., 509, 511.

"The legislature may create, or authorize the municipality to create a local taxing district for local improvement purposes, which includes part only of the property within the municipality. * * * Each parcel of contributing property may be assessed only to the extent that it actually receives special benefits."

Adams vs. City of Shelbyville, 57 N. E. Rep. (Ind.,) 114, 118.

(c) *If the assessment is in any instance in excess of the value of the special benefit conferred, it is as to such excess private property unjustly taken for public use without compensation to the owner.*

"There can be no justification for any proceeding which charges the land with an assessment greater than the benefits. It is a plain case of appropriating private property to public uses without compensation." * *

Cooley on Taxation, 661.

"In our judgment, the exaction from the owner of private property of the cost of a public improvement, in substantial excess of the special benefits accruing to him, is, to the extent of such excess, a taking under the guise of taxation of private property for public use without compensation."

Norwood vs. Baker, 172 U. S., 269, 279.

"If a sum is exacted in any instance in excess of the value of the special benefits conferred, it is as to such excess in that instance private property unjustly taken for public use without compensation. * * * (564.) Such assessments can only be constitutional when imposed to pay for local improvements clearly conferring special benefits on the properties assessed and to the extent of those benefits."

Chamberlain vs. Cleveland, 34 O. St., 551, 561, 564.

"It is true that the power of taxing is one of the high and indispensable prerogatives of the government, and it can be only in cases free from all doubt that its exercise can be declared by the courts to be illegal; but such a case, if it can ever arise, is certainly presented when property is specified out of which a public improvement is to be paid, if in excess of the value specially imparted to it by such improvement. As to such excess, I cannot distinguish an act exacting its payment from the exercise of the power of eminent domain. * * * (423.) When, then, the overplus beyond benefits from these local improvements, is laid upon a few land owners, such citizens with respect to such overplus are required to defray more than their share of the public outlay, and the coercive act is not within the proper scope of the powers of taxation."

State vs. Newark, 37 N. J. L., 415, 422, 423.

Judge Sherwood: "Whenever a local assessment upon an individual is not grounded upon and measured by the extent of his particular benefit, it is *pro tanto* a taking of his private property for public use without any provision for compensation. * * * (154.) Assessments on property peculiarly benefited by local improvements, and in consideration of such

benefit, are constitutional. Thus far have the judicial decisions in this and other states gone, and no further. * * * (157.) Local assessments can only be constitutional when imposed to pay for local improvements clearly conferring special benefits on the properties assessed, and to the extent of those benefits."

Hannrett vs. Philadelphia, 65 Pa. St., 146, 153.

(d) *That the excess of the cost of an improvement beyond the amount of the special benefits to the property assessed is a benefit to the municipality at large, and it must be borne by the general treasury.*

"If the cost of any improvement exceeds the local and peculiar benefits, the improvement should either not be made at all, or the excess should be assumed by the public and become a part of the general levy."

Cooley on Taxation, 663.

"When the property has paid the value of the special benefits so conferred, its owners stand in the same relation to any residue of the cost of the improvement remaining unpaid that other members of the public do, and all must bear the burden of paying such residue by general taxation."

Chamberlain vs. Cleveland, 34 O. St., 551, 561.

"A corporate purpose being ascertained and determined on by the city authorities, the principle should be adopted in order to carry it out, equally required by the constitution and demanded by the merest justice, assess to each lot the special benefit it will derive from the improvement, charging such benefits upon the lots and the residue of the cost be paid by equal and uniform taxation."

Chicago vs. Larned, 34 Ill., 203, 209.

"The taxing district as a whole may be assessed only to the extent of the special benefits actually received by the several parcels of contributing property. The improvement, so far as the cost exceeds the special benefit resulting to the several parcels of property in the taxing district, is a benefit to the municipality at large, and such excess must be borne by the general treasury."

Adams vs. Shelbyville, 57 N. E. Rep., (Ind.,) 114, 118.

In Dillon's Mun. Cor., Sec. 761, it is stated:

"The cost of a local improvement can be assessed upon particular property only to the extent that it is specially and particularly benefited, and since the excess beyond that is a benefit to the municipality at large, it must be borne by the general treasury."

IV.

The right to levy an assessment for local improvements upon the property benefited being based solely upon the benefit, and the amount of the assessment being limited by the benefit to each particular piece of property, the amount of benefits in each instance becomes a question of fact, and the taxpayer has a constitutional right to a hearing upon the question of the amount to be assessed for benefits before the tax becomes a fixed liability upon his property.

"It is a fundamental rule that in judicial or quasi-judicial proceedings affecting the rights of the citizen, he shall have notice and be given an opportunity to be heard before any judgment, decree, order or demand shall be given and established against him. Tax proceedings are not in the strict sense judicial, but they are quasi-judicial, and as they have the effect of a judgment, the reasons which require notice of judicial proceedings are always present when the conclusive steps are taken. Provision for notice is, therefore, part of the 'due process of law' which it has been customary to provide for these summary proceedings, and it is not to be lightly assumed that constitutional provisions carefully framed for the protection of property rights, were intended or could be construed to sanction legislation under which officers might secretly assess the citizen for any amount in their discretion, without giving him an opportunity to contest the justice of the assessment."

Cooley on Taxation, 363.

"It is undeniably true that a fundamental principle of enlightened jurisprudence is that no citizen's property should be taken without granting him the right to be heard, or, as it is commonly said, giving him his day in court."

Elliot on Streets, 415.

"The judgment of the circuit court must be affirmed on the ground that the assessments against the plaintiff's abutting property was under a rule which excluded any inquiry as to special benefits, and the necessary operation of which was to the extent of the excess of the cost of opening the street in question over any special benefits accruing to the abutting property therefrom, to take private property for public use without compensation."

Norwood vs. Baker, 172 U. S., 269, 297.

Mr. Justice Field: "Whatever the character of the proceeding, whether judicial or administrative, summary or protracted, or whether it attacks property directly or creates a

charge or liability which may be the basis of attacking it, the law directing the proceeding must provide for some kind of notice, and offer to the owner an opportunity to be heard, or the proceeding will want the essential ingredient of due process of law. Nothing is more clearly established by a weight of authority absolute and overwhelming, than that notice and opportunity to be heard are indispensable to the validity of the proceeding."

San Macto vs. So. Pac. Ry. Co., 13 Fed. R., 722, 752.

Justice Field: "The suggestion of counsel that there is a difference in the law as to notice and opportunity of being heard where an assessment is made for local purposes and where it is made under a statute providing revenue for the state, is without foundation. Taxation for local improvements, or for city, county or town purposes, involves the exercise of the same power which is exerted in taxation for state or general purposes. It is the sovereign power of the state in both cases which authorized the tax, whether that power be exerted directly by the act of the legislature or by a municipal power as an instrumentality of the state. 'That these assessments,' says Cooley, speaking of such as are special, 'are an exercise of the taxing power, has over and over again been affirmed, until the controversy may be regarded as closed.'

"* * * * The object, both of taxation for general purposes and of assessments for local purposes, is to raise money. In both cases property is valued and a certain proportion of the valuation taken for the designated purpose. Whether that purpose be general or local it in no respect changes the essential character of the proceeding. The property from which the exaction is to be made is less extensive in the one case than in the other, and in both there must be evidence of its value and a judicial determination respecting it, and the fact that in cases of local improvements there is sometimes a consideration also of the benefits to be received, takes nothing from the judicial character of the proceedings. The clause of the constitution which forbids the deprivation of property without due process of law, places liberty under the same guaranty, and no one can be deprived of either property or liberty under the name of taxation, any more than under any other name, by officers of the state, without some notice of their proceedings and a right to be heard respecting their determination before it is executed."

Santa Clara vs. So. Pac. Ry. Co., 18 Fed. Rep., 385, 411.

Judge Jackson: "The owner must in some form, in some tribunal, or before some official authorized to correct errors or mistakes, have an opportunity before him to be heard in respect to the proceeding under which his property is to be taken or

burdened, before the tax or assessment becomes final or effectual, in order to constitute such procedure due process of law. "* * * * (400.) The common council of Toledo having made the assessment in question without notice to or opportunity for hearing by complainant, and having the right to enforce its collection by distraining and selling their property without resorting to any suit which would give them an opportunity to interpose any defense, either to the validity or amount of said assessment, its action in the premises, even if authorized by the statutes of Ohio, is wanting in that 'due process of law' required by the federal constitution before depriving a citizen of his property."

Scott vs. City of Toledo, 36 Fed. Rep., 385, 397, 400.

Judge Jackson: "It appears from the allegations of the bill that complainant has had no notice of or any opportunity to be heard in relation to the assessments made by the board of public affairs of Cincinnati against the several lots described in the bill; that no provision was made in any of the ordinances or resolutions or acts of said city of Cincinnati, or of its officers or boards, giving to property owners the right and opportunity to be heard in respect to the amount of the special assessments complained of, and that no such provision (as complainant alleges) exists in any of the laws of the state applicable to said city and the assessments in question. Under such circumstances the court is of the opinion, in conformity with its holding in the case of *Scott vs. City of Toledo, 36 Fed. R., 385*, that the assessments made against complainant's lands are wanting in due process of law."

Murdock vs. City of Cin., 39 Fed. R., 891.

"One principle runs through all these definitions. Webster expresses it tersely when he says, 'By the law of the land is meant the general law, which hears before it condemns, which proceeds upon inquiry, and renders judgment only on trial.' The party to be affected by the process which deprives him of his life, liberty or property, must have notice of the time and place of hearing in some form, and at some time he must have the privilege of being heard. He must have his day in court."

Myers vs. Shields, 61 Fed. Rep., 713-718.

"The imposition of taxes is, in its nature, administrative, and not judicial, but assessors exercise quasi-judicial powers in arriving at the value, and opportunity to be heard should be, and is, given to all just systems of taxation according to value."

Palmer vs. McMahon, 133 U. S., 660.

"The commissioners were to ascertain what land within the district of assessment was benefited, and then to apportion and assess the said sum upon such land in proportion to benefits.

The assessment, when made, was declared to be a lien upon the land, and its payment could be enforced by the sale thereof. I am of opinion that the constitution sanctions no law imposing such an assessment without a notice to and a hearing, or an opportunity for a hearing by the owners of the property to be assessed."

Stuart vs Palmer, 74 N. Y., 183-188.

"Therefore, in reference to the imposition of these assessments as in reference to the imposition of other assessments and taxes, the lot owners were entitled at some stage of the proceedings to a notice and an opportunity to be heard, and unless the law gives them the right to notice and opportunity to be heard before the board which was authorized to impose the assessments, it was unconstitutional and void for the reason stated in *Stewart vs. Palmer 74 N. Y., 183.* * * * The rules laid down in *Stewart vs. Palmer*, are salutary and important, and for the protection of personal rights and private property must be enforced in all cases to which they are applicable."

Rensom vs. Wheeler, 105 N. Y., 573-579.

"When the public questions are settled, and the tax comes to be apportioned, a personal liability of the individual and a lien upon his property are initiated. He has right, then, to be heard upon all questions which affect and determine that liability."

Re Trustees of Union College, 129 N. Y., 308-313.

"It is well established that the determination of the amount of taxes for special benefits to real estate by any tribunal to which the legislature delegates the power, is a quasi-judicial proceeding, which cannot take final effect unless persons to be assessed have an opportunity to be heard."

Sears vs. Street Com'rs, 173 Mass., 350, 355.

"It is without doubt essential to the validity of every law under which proceedings may be had for the taking of property, or to impose a burden upon it which may result in taking it, that the law make provision for giving some kind of notice at some stage in the proceeding, and that it afford the owner an opportunity to be heard concerning the legality of the assessment, before some tribunal or body authorized to correct errors or give proper relief, before the property is taken or the charge made absolute."

Garvin vs. Danssman, 114 Ind., 429, 432.

"Property-owners affected by an improvement within a taxing district, are entitled to a hearing on the question of special benefits."

Adams vs. City of Shelbyville, 57 N. E. Rep., (Ind.) 114, 118

"Before special taxes can be made a fixed and permanent charge upon the property of individuals, the owners must have notice thereof, with an opportunity to be heard and an opportunity to contest their validity and fairness."

Gilmore vs. Hertig, 33 Kas., 156, 169.

"Our conclusion is that because of the want of any provision for a notice in either the statute of the city or ordinances or resolutions of the council, and the want of any opportunity for a hearing, these assessments must be held to be invalid * * * * * (724). Aside from authorities which ought to be absolutely conclusive upon the question, there can be no doubt that the ruling is founded upon the plainest principles of justice. The arbitrary appropriation of private property without notice, and without an opportunity for a hearing, cannot be defended upon any principle of natural justice, and ought not to be tolerated and upheld by the courts."

Gatch vs. City of Des Moines, Ia., 718, 722.

"The doctrine of the authorities is that whenever it is sought to deprive a person of his property, or to create a charge against it, preliminary to or which may be made the basis of taking it, the owner must have notice of the proceeding and be afforded an opportunity to be heard as to the correctness of the assessment or charge. It matters not what the character of the proceeding may be by virtue of which his property is to be taken, whether administrative, judicial, summary or otherwise, at some stage of it and before the property is taken or the charge becomes absolute against either the owner or his property, an opportunity for the correction of wrongs and errors which may have been committed, must be given, otherwise the constitutional guarantees above cited are infringed."

Brown vs. City of Denver, 7 Col., 305.

"No provision is made anywhere in the statute for any hearing by the land owner, whose land is to be charged. No notice is to be given him when the board of trustees is to levy the assessment, and if he appears when such assessment is to be levied by the board of trustees, no hearing by the board is provided for in the act. The collection provided for is summary and without suit brought at which the property owner can be heard. The assessment is by the terms of the act made an absolute lien on his property, without any provision or opportunity allowed him to show its illegality or unconstitutionality. For these reasons we are of the opinion, according to well settled rules, that the act is unconstitutional and the assessment and sale under it cannot be valid."

Hutson vs. Woodbridge, 79 Cal., 90, 94.

V.

It would seem to follow from the principles established in the foregoing cases, that any law which requires the cost of paving to be arbitrarily assessed upon the abutting property, without reference to the benefits, is in violation of the constitution and void.

But the plaintiffs in error, while admitting that special assessments are based upon benefits accruing to the property, maintain that it is within the power of the legislature to determine the district benefited by an improvement, the amount to be assessed upon the property, and the method of apportioning the same, and that such legislative determination is conclusive, and cite authorities where the doctrine is stated as follows:

"The power to determine what shall be the taxing district for any particular burden is purely a legislative power, and not to be interfered with or controlled except as it may be limited or restrained by constitutional provisions * * * * The legislature judges finally and conclusively upon all questions of policy, as it may also upon all questions of fact which are involved in the determination of a taxing district."

Cooley on Taxation, 149, 150.

This doctrine originated in New York, where the first case which we have been able to find in which a special assessment was sustained, was *People vs. Mayor of Brooklyn*, 4 N. Y., 419, decided in 1851, where the court say, (page 426):

"It must be conceded that the power of taxation and of apportioning taxation, and of assigning to each individual his share of the burden, is vested exclusively in the legislature, unless this power is limited or restrained by some constitutional provision. The power of taxing, and the power of apportioning taxation, are identical and inseparable. Taxes cannot be laid without apportionment, and the power of apportionment is therefore unlimited unless it be restrained as a part of the power of taxation. There is not, and since the original organization of the state government, there has not been any such constitutional limitation or restraint." * * * *

This case was followed by *People vs. Lawrence*, 41 N. Y., 127, decided in 1869 where the court say, (page 141):

"The settled principles to be deduced from these cases are that the sovereign power of taxation is lodged in the legislature; that the power of taxing and the power of apportioning taxation are identical and inseparable; that there is no constitutional restraint upon the exercise of this power; that the right of determining what portion of the public burdens by way of taxation shall be borne by any individual, or class of individuals, must

be determined by the legislature; that however much this power may be abused by the legislature, the only check upon it is the responsibility of the legislative body to its constituents. As taxation is indisputably a legislative power, and as the constitution contains no restriction upon the taxing power of the legislature, redress against unjust taxation must be sought in the same way, and no other, as redress against unjust and oppressive legislation in the general enactment of laws is sought. The judicial department of the government can afford no redress in such cases."

The absurdity of this doctrine is shown by its logical application by the courts to cases where it amounts to a confiscation of the property.

In a case where the law required the assessment to be made according to the front foot, the court say: "The lot against which this assessment was filed consists of a long, narrow strip, with a front of several hundred feet upon the street, and only thirty-one feet deep at one end and narrowing to the other. The lot is said not to be worth the amount of the assessment against it. If this be so, it does not affect the validity of the law under which the assessment was filed."

Harrisburg vs. McCormick, 129 Pa., 213.
Terry vs. City of Hartford, 39 Conn., 291.

These are the leading cases which are cited by Judge Cooley in his work on taxation, and are the foundation of all subsequent cases which sustain the doctrine advocated by appellants; it is only upon this doctrine that the arbitrary assessment of benefits by frontage and area can be sustained; and all the cases which are cited by plaintiffs in error, or which we have been able to find in which such arbitrary assessments have been sustained, the basis of this decision is the doctrine of the absolute power of the legislature to finally decide those questions

If the legislature has this power, then the courts cannot interfere upon any pretext or pass upon the justice, equity or reasonableness of the legislative decision, no matter how inequitable or arbitrary it may be, or how much it may violate the constitutional rights of the taxpayer. It will be observed that in order to sustain these assessments the doctrine, as stated, must be maintained to its full extent, for the decision of this question, as we have said, depends upon the power of the legislature, and unless the legislature has the power to the extent claimed by appellants, such assessment cannot be maintained.

This being a question of legislative power, if it appears that this power is limited in any respect, then the doctrine that the acts of the legislature are conclusive necessarily falls, and the validity of all of the acts of the legislature in regard to special assessments are open to question by the taxpayer; so that this case resolves itself finally to the one question of the power of the legislature.

Ever since the independence of the United States, there has existed a marked division of opinion as to the relative powers of the legislature and judiciary. At the time of the Revolution, and for a long time thereafter, the idea prevailed that the legislature was endowed with all the powers of parliament, and no consideration seems to have been given to the difference between the powers of parliament and the powers of a legislature under a written constitution.

The early doctrine in the United States is illustrated by a decision of the Supreme Court of New York, rendered in 1784, where the court say: "The supremacy of the legislature can not be called into question. If they think fit positively to enact a law, there is no power which can control them. When the main object of such act is clearly expressed, and the intention is manifest, the judges are not at liberty, although it appears to them to be unreasonable, to reject them, for this were to set the judicial above the legislative, which would be subversive of all government."

Rutgers vs. Waddington, Coxe's Ind. Power, 223

It was not until 1803 that the power of the judiciary to declare statutes unconstitutional, was finally settled by a decision of the supreme Court of the United States.

Marbury vs. Madison, 1 Cranch., 137.

It was not until long afterwards that the doctrine was applied to any statutes, except such as encroached upon the judicial power, and as late as 1825, Judge Gibson, in the case of *Eakin vs. Raub*, 12 S. & R., (Pa.,) 330, in a dissenting opinion, denied the power of the judiciary to hold statutes unconstitutional.

The early cases sustaining special assessments were expressly based upon the unlimited power of the legislature, and were evidently the outgrowth of this doctrine, but since that time, and particularly within the last thirty years, it has become firmly established that under a written constitution, the power of the legislature is limited by the provisions of both the federal and state constitutions, and that it is always within the power of the judiciary to decide when, and to what extent the act transcends the power of the legislature.

It will be observed by an analysis of the cases cited, that as the constitutional rights of the citizen have been more fully recognized, the exercise of arbitrary power by the legislature over the property of the citizen has been narrowed from year to year, until such power can hardly be said to exist at the present time, and this is true, not only in regard to general legislation, but in regard to the power of taxation, both general and special.

VI.

Taxes, whether general or special, can only be levied for public purposes, and while the legislature may determine for itself whether a given purpose is or is not public, such determination is not conclusive, and the taxpayer always has a right to contest the matter, and if it is made to appear that the purpose of the tax is not public, the right of the individual is clear.

"The legislature must consequently determine for itself in every instance, whether a particular purpose is or is not one which so far concerns the public as to render taxation admissible, but it is generally admitted that the legislative determination on this subject is not absolutely conclusive. It may be sufficiently so to put the administrative machinery of the state in motion, but when the exaction is made of an individual and the power of the state is made use of to compel submission, he has always a right to invoke the protection of the law, and an appeal to the law for protection of individual property must necessarily render the question which lies at the foundation of the demand a judicial question upon which the courts cannot refuse to pass judgment * * * * * (104). In attempting to exercise the right in any particular case, the legislature merely asserts its jurisdiction to act, but questions of jurisdiction are not usually concluded by a decision in its favor, made by the party claiming it; they necessarily remain open and may be disputed anywhere * * * When, therefore, the question of the validity of taxation becomes judicial, if it shall appear that the exaction is made for a purpose not public, the right of the individual to protection is clear. Such an exaction is not within the competency of the legislative power, and the attempt to enforce it, however honestly made, could only be an attempt to take property from its possessor under an authority which the law of the land does not recognize."

Cooley on Taxation, 103.

"We have referred to this history of the contest over aid to railroads by taxation, to show that the strongest advocates for the validity of these laws never place it on the ground of the unlimited power in the state legislature to tax the people, but concede that where the purpose for which the tax is to be assessed could no longer be justly claimed to have this public character, but was purely in aid of private or personal objects, the law authorizing it was beyond the legislative power and was an authorized invasion of private rights. It must be conceded that there are such rights in every free government, beyond the control of the state. A government which recognizes no such rights, which holds the lives, liberty and property of its citizens

subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is, after all, but a despotism."

Loan Association vs. Topeka, 20 Wall., 655.

"To promote a public purpose by tax levied upon the property in the state, is within the power of the legislature, but the legislature has no power to impose taxes for the benefit of individuals connected with a private enterprise, even though the private enterprise might benefit the local public in a remote or collateral way. Legislative power of taxation is not illimitable."

People vs. Parks, 58 Cal., 624. 639.

"Two propositions may be considered settled: First, that taxation to be sustained must be for a public purpose."

State vs. Osawkee Tp., 14 Kas., 418, 420.

"The legislature has not the power to so determine that a use is a public use as to make the determination conclusive. The attempt of the legislature to exercise the right of eminent domain does not settle that it has the right, but the existence of the right in the legislature in any class of cases, is left to be determined under the constitution by the courts."

Allen vs. Inhabitants of Jay, 60 Me., 124, 139.

In *Weismer vs. Village of Douglas*, 64 N. Y., 91, which was a suit to restrain the collection of bonds of the village issued in payment of capital stock in a manufacturing company, it was held that the legislature had no power to conclusively determine that the object of a tax was for a public purpose, and the tax was held void.

In *Jenkins vs. Andover*, 103 Mass., 94, and *Curtis vs. Whipple*, 24 Wis., 350, it was held that statutes authorizing cities to raise by taxation and appropriate money to aid in private schools, were beyond the power of the legislature and unconstitutional and void.

VII.

The tax must pertain to the district taxed, if it does not, the legislature must be held to have assumed an authority not conferred in the general grant of the legislative power, and it is, therefore, unconstitutional and void.

"If the legislature should arbitrarily designate a certain class of persons on whom to impose a tax, either for general

purposes or for a local object of a public nature, without any reference to any rule of proportion whatever, having no regard to the share of public charges which each ought to pay relatively to that borne by all others, or to any supposed peculiar benefit or profit which would accrue to those made subject to the tax which would inure to others, so that in effect the burden would fall on those who had been selected only for the reason that they might be made subject to the tax, we cannot doubt that the imposition of it would be an unlawful exercise of power, not warranted by the constitution, against the exercise of which a person aggrieved might sue for protection. And it is no more incompetent to select classes of persons for exceptional burdens than it is to select districts of the state for that purpose."

Cooley on Taxation, 141.

"It is generally agreed, if not universally conceded, that the legislature cannot impose upon the persons residing in a particular locality or portion of the territory, a tax for the benefit of the whole state, nor on a borough or township for the benefit of a county, any more than upon a single individual."

Durach's Appeal, 62 Pa. St., 491, 494.

"It is perfectly true that it would be held beyond the scope of legislative power to authorize a municipality to levy a local tax for general purposes. The burdens of the whole community cannot be shifted to the shoulders of one man who has only an interest in common with all the rest."

McCormick vs. Patchin, 53 Mo., 33, 36.

In a case of a special assessment for constructing and maintaining a boulevard, it was held that such repair and maintenance was not a local improvement, the Court say, (page 354:) "We entertain no doubt that in the passage of this statute the general assembly exceeded its constitutional power. The act is, therefore, void, and conferred no power upon the commissioners to levy the tax in question, and the circuit court should for that reason have enjoined its collection."

Crane vs. West Chicago Park Com'rs, 153 Ill., 348.

In *Smith vs. Sherry*, 50 Wis., 210, it was held that an act annexing territory to a village not contiguous to or adjoining it, and thereby subjecting such separate territory to the payment of village taxes, was unconstitutional and void.

In *Wells vs. City of Weston*, 22 Mo., 384, where the statute had authorized the city of Weston to assess a tax on all real estate outside of and adjoining the corporation to a distance of one half mile, and suit was brought to set a ide a tax assessed under the charter, the court held that the legislature had no authority to confer such power on the city.

The principles established by the foregoing authority which apply equally to general taxes and special assessments, are summarized as follows:

"When, therefore, the legislature assumes to impose a pecuniary burden upon the citizen in the form of a tax, two questions may always be raised; first, whether the purpose of such burden may properly be considered public on any of the grounds above indicated; and second, if public, then whether the burden is one which should properly be borne by the district upon which it is imposed. If either of these questions is answered in the negative the legislature must be held to have assumed an authority not conferred in the general grant of legislative power, and which is therefore unconstitutional and void."

Cooley Const. Lim., 611.

VIII.

The legislature cannot pass conclusive rules of evidence, so as to make the showing by one party to a controversy, whether the public or a private citizen, conclusive of the truth of the facts shown.

"The legislature cannot pass conclusive rules of evidence; that is to say, it cannot make the showing by one party to a controversy conclusive of the truth of the facts shown, thus in effect denying to the other party a hearing. Its power over the rules of evidence is the power to shape and mould for the purposes of justice the rules under which parties are to make a showing of their rights, and not the power to preclude their showing them. * * * A statute, therefore, which should make a tax deed conclusive evidence of a complete title, and preclude the owner of the original title from showing its invalidity, would be void because not a law regulating evidence, but an unconstitutional confiscation of property. The case supposed is but an illustration of the general rule which applies as well to all the necessary and jurisdictional steps leading up to the deed. The law of the land requires that every party should have an opportunity for a trial of such rights as he claims, and there can be no trial if only one party is suffered to produce his proofs."

Cooley on Taxation, page 298.

In *Zeigler vs. Southern & Northern Ala. Ry. Co.*, 58 Ala., 594, the Court say, (page 599:) "Due process of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty or property in its most comprehensive sense, to be heard

by testimony or otherwise, and to have the right of controverting by proof every material fact which bears on the question of right in the matter involved. If any question of fact or liability be conclusively presumed against him, this is not due process of law."

"A legislature has no power to find facts by legislative enactment so as to be evidence in suits againsts persons who are not applicants for the act."

Lothrop vs. Steadman, 42 Conn., 583, 592.

IX.

The legislature cannot arbitrarily fix the valuation of property for assessment, or determine the amount of tax to be levied, or the amount of a special assessment to be levied upon a district for a local improvement.

"The legislature cannot make the valuation of property for taxation."

Cooley on Taxation, 410.

"The legislature can no more impose an assessment for which property can be taken and sold than it can render a judgment."

Harris' Am. Con. Law, 315.

MR. JUSTICE FIELD:

"There is something repugnant to all principles of justice in the doctrine that any body of men can be clothed with the power of finally determining the value of another's property, according to which it may be taxed, without affording him an opportunity to be heard respecting the correctness of their action. * * * The legislature can no more arbitrarily impose an assessment for which property can be taken and sold, than it can render a judgment against a person without a hearing."

San Mateo vs. So. Pac. R. R. Co., 13 Fed. Rep'r, 722, 752.

"Suppose the legislature should pass a law authorizing the taking of private property for public use, and should in the same act fix the compensation which they supposed to be just to be paid for it, no one would contend that the legislature was competent to determine by law what would be a just compensation for the property taken. The action of the legislature to this extent would be held arbitrary and unconstitutional. Nor could the legislature or a corporation, either by law or an ordinance, declare the value of property or what would be a just

assessment upon it, so as to make the assessment uniform and equal in value, and for a like reason a relative estimate of benefit and burden by law. Such assessment and valuation is essentially a matter of fact to be ascertained by evidence and not by law."

Peay vs. Little Rock, 32 Ark., 31, 39.

"The jury are required to assess one-half upon the assessment district, regardless of whether it is benefited to that extent, and are clothed with power to assess a larger amount only when they conclude that the benefit exceeds fifty per cent. The legislature has power to fix an arbitrary percentage of a public improvement to be imposed upon a local assessment district, regardless of the benefits received."

Detroit vs Judge of Recorder's Court 122 Mich., 588-589.

"When the public questions are setled, and the tax comes to be apportioned, a personal liability of the individual and the lien upon his property are initiated, and he has a right then to be heard upon all the questions which affect and determine that liability. His right is to pay no more than his just proportion, and the legislature cannot arbitrarily determine the amount, refusing to the person assessed a reasonable opportunity to be heard."

Re Trustees Union College, 125 N. Y., 308.

"The charter contains no provision whatever under which benefits to the property against which an asessment is ordered may be ascertained or even considered. The council arbitrarily and many years in advance determine and declare what amount should be assesed against defendant's property whenever a sewer should be constructed in the street upon which it fronted. The charter authorizes this method, and none other, except at the option of the council the first plan may be adopted. Of course, the amount to be assessed per lineal foot of frontage might be increased not to exceed a total of four dollars per foot, or might be decreased at the will of the council, but at no time was this body obliged to consider or ascertain benefits. No plan of assessment can be upheld which will permit such an outrageous departure from the principles of uniformity and equality in taxation embodied in the constitution as will this one now being considered."

Minnesota vs. Pillsbury, N. W Rep., (decided Feby. 6, 1901.)

In *Brady vs. King*, 53 Cal., 44, where the legislature had passed a curative act declaring an assessment valid, the act of the legislature was an attempt to levy a contribution within a certain district and to declarre that each lot named in the or-

iginal roll should pay a sum arbitrarily fixed. This would be to create a lien on defendant's real estate which, if the law were valid, the courts would be compelled to endorse. If this can be done, the legislature may take the property of a citizen without any legal process, for there is no difference between taking the property directly and imposing a lien upon it: but no person can be deprived of life, liberty or property without due process of law."

In *Johnson vs. Milwaukee*, 40 Wis., 315, which was an action brought to enjoin a special assessment on a lot for improving the water front, the court, after discussing the facts and the manner in which the assessment was made, say, (page 327): "We prefer to rest the invalidity of the assessment in this case upon the ground that the Commissioner of Public Works based the assessment upon cost instead of the actual benefits positively and specially accruing to the property assessed in consequence of the improvement."

X.

The proceedings to ascertain and fix the amount of benefits in any particular instance involves an inquiry into the facts that cannot be duly ascertained without the production of witnesses and the consideration of their testimony, as well as the consideration of all the facts and circumstances surrounding each improvement. This is a judicial act, and transcends the legislative province, which is to lay down rules and not to determine what persons or things are within their scope.

"Wherever the principle is adopted that assessments for local improvement can be justified only to the extent of special benefits actually received, and must be apportioned accordingly, * * * * the question of the existence and extent of benefit becomes in its nature judicial."

Dillon's Mun. Cor., 802a.

"Whatever the rule may be when a tax is general and will presumably be compensated by the appropriation of the proceeds, there can be little doubt that local taxation, depending for its constitutionality on the existence of some special benefit and to be apportioned according to the advantage so conferred, should be based on an assessment not made legislatively but through some proceeding in accordance with the immutable principle that no man shall be injured in his person or estate without a hearing. Such taxation not only involves an inquiry into facts that cannot be duly ascertained without the production of witnesses and the argumentative consideration of their

testimony, that would seriously embarrass and delay legislation, but transcends the legislative province which is to lay down rules and not determine what things or persons are in their scope, and is at variance with the constitutional distribution of functions of government among its several branches, which operates as an implied restraint on each, even when their authority is absolute as a whole.".

Hare's Am. Court Law, 312.

"It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body, or the public as a whole) operates to divest the other party of any rights of person or property."

Ragan vs. Farmers' Loan & Tr. Co., 154 U. S., 399.

"Whenever an act undertakes to determine a question of right, of obligation or of property, as the foundation upon which it proceeds, such act is to that extent a judicial one, and not the proper exercise of legislative functions."

The Sinking Fund Cases, 99 U. S., 700, 701.

"The constitution of this state has not committed to the legislature a power of conclusively determining what facts are jurisdictional or vital to the exercise of the power of taxation or sale, divesting the title of the citizen's property for non-payment of taxes. Such determination belongs to the judiciary."

Larson vs. Dicky, 39 Neb., 463, 471.

Where the question was as to the nature of the function determining the existence and extent of special benefits, the court say:

"It is in fact a judicial inquiry, and should be proceeded with as such. * * * The determination of what constitutes a benefit, and its valuation, says Mr. Sedgewick, are judicial acts which do not pertain to the legislative function."

Norfolk vs. Ellis, 26 Gratt., 242.

"The citizen cannot be deprived of his property by involuntary divestiture of his right to it, or by such transfer of it to another, except by a judgment of law, and the legislature having no judicial power cannot impart to their enactments the force of a judicial determination. The legislative power extends only to the making of laws, and in its exercise is limited and restrained by the paramount authority of the state and federal constitutions. It cannot directly reach the property or vested rights of the citizen by providing for their forfeiture or transfer to another without trial and judgment in the courts, for to do

so would be the exercise of a power which belongs to another branch of the government and is forbidden to the legislative."

Newland vs. Marsh, 19 Ill., 376, 382.

"Whether the act authorizing a local assessment for a local improvement contains such an express recital or declaration or not, it is open to any one aggrieved to impeach it as a violation of his private right, if it can be made clearly to appear that the object proposed is not in fact one in which the public has an interest, and that the assessment has been made upon persons who have not consented to it and are not benefited by the improvement, or that the assessment exceeds the estimated benefit. In all such cases the act is in effect the taking of one man's property for the benefit of another, and beyond the constitutional power of the legislature. The courts are bound to declare such an act void."

Brown vs. Keener, 74 N. C., 714.

In *Tyson vs. School Directors*, 51 Pa. St., 9, where the legislature passed an act authorizing the raising of money to reimburse moneys advanced to save the people of the township from drafting, the court say (page 22:)

"Such an enactment would not be legislation at all; it would be in the nature of judicial action, it is true, but wanting the justice of notice to parties to be affected by the hearing, trial, and all that gives sanction and force to regular judicial proceedings. It would much more resemble an imperial rescript than constitutional legislation; first, in declaring an obligation when none was created or previously existed, and next, in decreeing payment by directing the money or property of the people to be sequestered to make the payment. The legislature can exercise no such despotic functions."

XI.

The prohibition contained in the fourteenth amendment to the Constitution of the United States, "nor shall any state deprive any person of life, liberty or property without due process of law," is a limitation upon the powers of the legislature in taxation as well as in all other respects.

"It must be observed that the prohibitions of the amendment refer to all the instrumentalities of the state, to its legislative, executive and judicial authorities, and, therefore, whoever, by virtue of public position under a state government, deprives another of any right protected by this amendment against the deprivation by the state, 'violates the constitutional inhibition, and as he acts in the name and for the state, and is

clothed with the state's power, his act is that of the state.' This must be so or, as we have often said, the constitutional prohibition has no meaning."

Chicago, Burlington Ry. vs. Chicago, 166 U. S., 226, 233.

FIELD, J.: "There being, then, no provision of law giving to the company notice of the action of the state board and an opportunity respecting it, is the assessment valid? Would the taking of the company's property in the enforcement of the tax levied according to the assessment be depriving it of its property without due process of law? It seems to me there can be but one answer to these questions. * * * * (751) The provision in this amendment is in the form of an interdict upon the states, 'nor shall any state deprive any person of life, liberty or property without due process of law,' and by due process is meant one which following the forms of law is appropriate to the case and just to the practice to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adopted to the end to be attained, and it must give to the party to be affected an opportunity to be heard respecting the justice of the judgment sought. Without these conditions entering into the proceeding it would be anything but due process of law."

San Mateo vs. So. Pac. Ry. Co., 13 Fed. R., 722, 750. 751.

JUDGE STORY: "That government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least no court of justice in this country would be warranted in assuming that the power to violate and disregard them, a power so repugnant to the common principles of justice and civil liberty, lurks under any general grant of legislative authority or ought to be implied from any general expressions of the will of the people."

Wilkinson vs. Leland, 2 Pet., 627, 657.

"No matter under what form the power is professedly exercised, whether it be in the form of laying or authorizing a tax, or in the regulation of local divisions or boundaries, which result in a subjection to local taxes, and whether the operation be to appropriate the property of one or more individuals without their consenting to the use of the general or local public, or to the use of other private individuals or of a single individual, the case must be regarded as coming within the prohibition contained in this clause of the constitution is impotent for the protection of individual rights of property from any aggression, however flagrant, which may be made upon them, provided it

be done under color of some recognized power. We are not prepared to concede that it is thus impotent."

Cheanay vs. Hoosier, 9 B. Mon., 330.

XII.

The legislature cannot fix, or authorize the municipality to fix an arbitrary basis for an assessment to be imposed upon the property without regard to benefits, and any law which requires or permits the municipal authorities to assess the whole or any specified part of the cost of an improvement upon property in a district, without giving to the taxpayer the right to contest the amount of his benefits, deprives the taxpayer ot his property without due process of law.

"Whether it is competent for the legislature to declare that no part of the expense of a local improvement of a public nature shall be borne by a general tax, and that the whole of it shall be assessed upon the abutting property and other property in the vicinity of the improvement, thus for itself conclusively determining not only that such property is specially benefited, but that it is thus benefited to the extent of the cost of the improvement, and then to provide for an apportionment of the amount by an estimate to be made by designated boards or officers, or by frontage or superficial area, is a question upon which the courts are not agreed. Almost all of the earlier cases asserted that the legislative discretion in an apportionment of public burdens extended this far, and such legislation is still upheld in most of the states; but, since the period when the express provision has been made in many of the state constitutions requiring uniformity and equality of taxation, several courts of great respectability, either by force of this requirement, or in the spirit of it, and perceiving that special benefits actually received by each parcel of contributing property was the only principle upon which such assessment can justly rest, and that any other rule is unequal, oppressive and arbitrary, have denied the unlimited scope of legislative discretion and power, and asserted, what must upon principle, be regarded as a just and reasonable doctrine, that the cost of a local improvement can be assessed upon particular property only to the extent that it is specially and peculiarly benefited, and since the excess beyond that is a benefit to the municipality at large, it must be borne by the general treasury."

2nd. Dillon's Mun. Cor., Sec. 761.

"The question upon which we expressly doubt is whether, considering the question solely on principle, the legislature can

arbitrarily decide or invest local officers with the authority to arbitrarily decide what property is benefited by the improvement * * * * * For our part we very much doubt whether in any case the right to arbitrary decision by the legislature can be defended on strict principle, and we cannot forbear suggesting that the judiciary ought not, and in truth cannot, surrender its power to decide questions affecting the right to impose special burdens on private property. The matter of levying taxes for general revenue is exclusively legislative, and is fettered only by the limitation of the constitution; whereas the legislative power to exact a special tax from the property owner rests upon the fact that there is a betterment of his property to the extent of the cost of the improvement."

Elliott on Streets, 392.

"The cost of a public work can be imposed on particular classes or localities so far only as the benefit which they receive exceeds that derived by the rest of the community, which should be ascertained by some proper means and cannot be arbitrarily determined by the legislature nor without an opportunity for the parties interested to be heard in their own behalf. * * * * The legislature may declare that land or that chattels shall be taxed, and according to what rate, and no power short of popular will can reverse the decree; but if they go further and charge individuals or classes without providing some proper means of ascertaining whether they are in fact liable, the attempt will contravene the principle that no man should be deprived of any valuable right without a hearing, and may be frustrated by the judiciary. It may accordingly be regarded as established that taxation implies such an apportionment as will distribute the burden equally among all persons in like case, and that the legislature can no more make an assessment under which property may be taken and sold than it could render a decree that might be attended by the same result. * * *

* * * "Taxation and asaessment imply apportionment. Each person must share the burden of taxation and assessment equally with all others in like manner. It must be conceded that property cannot be taken by the right of eminent domain without some notice to the owner or some opportunity on the part of the owner at some stage of the proceeding to be heard as to the compensation to be awarded him. An act of the legislature arbitrarily taking property for the public good, and fixing the compensation to be paid, could not be upheld. There would in such case be the absence of that 'due process of law' which both the federal and state constitutions guarantee to every citizen. Can it be that when the public takes land for a public highway, the owners thereof are entitled to a hearing as to the compensation which they are to receive, and yet that the lands on both sides of the highway may be assessed to pay such com-

pensation to their entire value, without any opportunity on the part of the owners to be heard?"

Hare's Am. Const. Law, 310, 312 315.

"But the power of the legislature in these matters is not unlimited. There is a point beyond which the legislative department, even when exercising the power of taxation, may not go, consistent with the citizen's right of property. As already indicated, the principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore the owners do not in fact pay anything in excess of what they receive by reason of such improvement. but the guaranties for the protection of private property would be seriously impaired if it were estabished as a rule of constitutional law that the imposition by the legislature upon particular private property of the entire cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such improvement, could not be questioned by him in the courts of the country. It is one thing for the legislature to prescribe it as a general rule that property abutting on a street opened by the public shall be deemed to have been specially benefited by such improvement, and therefore should specially contribute to the cost incurred by the public. It is quite a different thing to lay it down as an absolute rule that such property, whether it is in fact benefited or not by the opening of the street, may be assessed by the front foot for a fixed sum, representing the whole cost of the improvement, and without any right in the property owner to show, when an assessment of that kind is made or is about to be made, that the sum so fixed is in excess of the benefits received. In our judgment the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him, is, to the extent of such excess, a taking under the guise of taxation of private property for public use without compensation."

Norwood vs. Baker, 172 U. S., 269, 278.

Where the statute required the assessable cost to be apportioned to each parcel in proportion to the number of front feet, the court says: "It is now settled law in this court, as it is in the supreme court of the United States and in many other courts, that after the construction of a public improvement, a local assessment for the cost of it cannot be laid upon real estate in substantial excess of the benefit received by the property. Such assessments must be founded on the benefits and be apportioned to the benefits. So far as there is anything in the earlier cases which seems at variance with this doctrine, it is controlled by the later decisions. * * * In determining whether a statute is unconstitutional, the question is not whether the result is harmful in a particular case, but whether the stat-

ute according to its terms will violate the provisions of the constitution in its application to cases which may be expected to arise."

Dexter vs. Boston, 57 N. E. R., (Mass.,) 379.

"We recognize the binding force of the decision of the Supreme Court of the United States upon this question, but we the more readily apply it because we endorse it as a timely and just announcement of the superiority of constitutional guaranty over a rule of law established by the courts. * * * Norwood *vs.* Baker establishes the following propositions which are applicable to the case at bar: 1. The legislature of a state cannot authorize a municipal corporation to assess upon abutting property the cost of a public improvement in a sum materially exceeding the special benefits which that property may derive from the work?"

Hutchinson vs. Storrie, 92 Tex., 685, 691, 692.

Where a bill was filed to enjoin the defendant from collecting an assessment for paving according to foot front, Hadley, Chief Justic, says: "While the facts in the Norwood-Baker case are unusual and distinguishable from the facts in the case at bar, yet it cannot be successfully denied that the general doctrine laid down is to the effect that the imposition of assessments for local improvements per foot front irrespective of the question of accruing benefits, is in violation of the Fourteenth Amendment to the Federal Constitution, and that the case has been so construed generally by the courts of the country. * * * The judgment of the Federal Supreme Court defining the limits of legislative power sanctioned by the Federal Constitution is the supreme law of the land. It commands state courts as well as state legislatures. The duty thus imposed is agreeable, as being in accordance with our sense of just principles and as furnishing the only reasonable foundation for the exercise of the taxing power in respect to special assessments."

Adams vs. Shelbyville, 57 N. E. R., (Ind.) 114.

"The stake driven by the decision in *Norwood vs. Baker* is timely. Judicial expression on the subject was indefinite. There was a tendency to lose sight of the equitable basis which justifies assessment upon private property of the cost of public improvements. The arbitrary act of the legislative body was often accepted as final without regard to its justice. It is to be hoped that the highest court of the land has spoken finally and will not recede from its position. For the reason that the statute in question embraces an arbitrary system of taxation without regard to benefits, provides for no method of determining the question of benefits, and no opportunity to be heard in reference thereto, and for the reason that from the face of the act it appears that the legislature in its adoption and passage did not consider or take into account the benefit to accrue to the

property upon which such assessment was levied, we hold that the statute is invalid, because it is in effect a taking of private property under the guise of taxation without just compensation and without due process of law."

County of Ramsey vs. Lewis, (N. W. Reporter, decided February 7th, 1901.)

"The legislature cannot fix or authorize the governing body of the municipality to fix an arbitrary basis for an assessment to be imposed upon property without regard to benefits. If this be done, the principle which justifies special assessments abutting property, viz: that it is thereby specially and peculiarly benefited, is wholly ignored, the result being that under the guise of taxation the owner is deprived of his property without just compensation and for the use of the public."

Minnesota vs. Pillsbury, (N. W. Rep., decided Feb. 6th, 1901,)

The principles established in the decision of *Norwood vs. Baker* have been applied to assessments for paving under statutes requiring the assessment to be made by the front foot similar to the one in the case at bar, in the following cases in the Circuit Courts of the United States, to which we refer, while not including them in our brief:

Fay vs. Springfield, 94 Fed. R., 409, (W. D. of Missouri.)

Charles vs. City of Marion, 100 Fed. R., 538 (District of Ind.)

Lyon vs. Tonawanda, 98 Fed. R., 361, (N. D. of N. Y.)

Cowley vs. Spokane, 99 Fed. R., 840, (E. D. of Wash.)

Biddle vs. Huff, 103 Fed. R., 362, (S. D. of Ga.)

"The identical question arising on the record now before us has been passed on by this court on several occasions, but is now presented distinctively as a federal question. * * * (592) Due process of law is not confined to judicial proceedings. The article of the constitution is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave the legislature free to make any process due process of law by its mere will and pleasure. * * * * There would seem to be no doubt that notice in all such cases as the present is required to constitute due process of law, and is essential to the validity of the assessment. * * * * * (594) As we have seen, section 34 of article 47 of the city code, is a general ordinance which provides in all cases of grading and paving streets that the whole cost shall be borne by the abutting owners in proportion to the number of front feet owned by them respectively. Nothing could be more arbitrary than this.

The cost is apportioned in advance without any reference whatever to the value of the property, but solely with regard to the number of front feet, by which rule the heaviest amount may fall on the least valuable property, and the lightest on the most valuable. * * * * The property holders are condemned to pay what is exacted of them without having been afforded an opportunity to be heard in their own defense at all. Why should the citizen not be allowed to contest the fairness and equality of the front foot rule, or any other rule adopted by the city, when one of the very conditions upon which, as we have seen, the constitutionality of the measure depends is that the owner shall have the right to be heard 'upon the question what proportion of the tax shall be assessed upon his land.' The right to direct the imposition of such special tax upon such property rests upon the theory of the special benefits accruing to the particular property from the proposed improvement."

Ullman vs. Mayor, 72 Md., 587, 588.

"No one will question the right of the City of Trenton, under legislative authority, to grade, pave and sewer streets, and include the expense in the general tax levy, while an attempt to impose the cost of such work in excess of any special benefits actually conferred upon a taxing district less than the political district of which it is a part, would be instantly arrested by an appeal to the appropriate judicial tribunal. The reason upon which this well-settled doctrine in this state is rested is that it would be a violation of our constitutional provision 'that private property shall not be taken for public use without just compensation.' In other states arbitrary exactions of this character have been sanctioned on the ground that the principle upon which taxation is founded is that the taxpayer is supposed to receive just compensation in the benefits conferred by the government under which he lives, and that the law-maker is the sole judge as to whether the benefits received are commensurate with the burdens imposed. Upon this theory, in *People vs. Lawrence*, 41 N. Y., 123, the cost of paying a railway company for relinquishing their right to use steam in the city, with the cost of closing their tunnel and grading the street over it, was laid without reference to actual benefits upon specified property in the vicinity of the improvement. To justify this conclusion, the court declared that the right of determining what portion of the public burden by way of taxation shall be borne by any individual or class of individuals, is in the legislature absolute, and however much abused, can be redressed only by a legislative enactment. This is an assertion of power little, if any, less than despotism wields over the property of its subject (582) To the extent that a locality is peculiarly benefited, the legislature may, at will, declare it to be a special taxing district for the purpose of bearing the burden, and provide a way in which such benefits shall be computed and

levied, but to impose upon A, because he chances to reside upon a certain street where the work is done or the expense incurred, so much of the cost as inures to the public benefit, in which he has no greater interest than any other citizen, would violate established principles as clearly as if the expenditure had been incurred in a part of the township remote from him. The existence of such power can be maintained only by asserting that the law-maker is a final arbiter who is to determine whether the individual citizen derives such benefit from any given measure as would justify the burden cast upon him, a doctrine which has hitherto found no countenance in our courts. (583) While it is thus clear that the burden of a particular tax may be placed exclusively on any political district to whose benefit such tax is to inure, it seems to be equally clear that when such burden is sought to be imposed upon particular lands not in themselves constituting a political subdivision of the state, we approach the line which is the boundary between acts of taxation and acts of confiscation. I think it impossible to assert with the least show of reason that the legislative right to select the subject of taxation is unlimited."

State vs. Fuller, 39 N. J. L., 576, 579, 583.

"If there be such a flagrant and palpable departure from equity in the burden imposed, if it be imposed for the benefit of others or for purposes in which those objecting have no interest and are therefore not bound to contribute, it does not matter in what form the power is exercised, whether in the unequal levy of a tax, or in the regulation of the boundaries of the local government which results in subjecting a party unjustly to local taxes, it must be regarded as coming within the prohibition of the constitution designed to protect private rights against aggression, however made, and whether under the color of recognized power or not."

Morford vs. Unger, 8 Ia., 82, 92.

"That the ordinance also fails to meet the rule of equality and justice as expounded by this court in the cases cited. It compels the assessor to assess the whole expense of the improvement on the property benefited so that the general fund shall bear no part of it, even though the individual property might not be specially benefited to the extent of the cost of the improvement. It assumes there must be lots which will be specially benefited to an amount equal to the whole cost of the improvement, while it may even occur that such is not the case, and under this assumption compels the assessor to find that the property is so benefited, or, in other words, to assess the whole expense upon property benefited. This violates the rule that the assessment shall be made upon the property specially benefited."

St. John vs. E. St. Louis, 50 Ill., 92, 96.

"It is fortunate for the rights of the people when a case occurs causing the courts to pause and retrace the boundaries of delegated power. Thus the stealthy steps of invasion may be detected and the power denied ere it be too late, and the precedent become fixed beyond judicial control. This is such a case. The attempt is to apply here the frontage rule of valuation of compact city lots to a rural population, and make farm property and town lots indiscriminately pay for an expensively paved city highway under the name of a street running far out into the country. The assumption is that by the addition of extensive rural districts to a city, the whole surface is brought by the legislative power within the sway of city taxation for municipal purposes, and cases are cited of local or special taxation for local purposes as justifying this stretch of power. But seeming analogies must not be allowed to lead our minds astray. Fortunately this subject has been examined in several recent cases leading to a fuller development of the principles at the foundation of this power. (Citations.) In the early cases the mode of determining the benefits to pay the damages and costs of construction was by actual view and assessment. (Citations.) In none of these cases was there a close examination of the per foot front rule, but it seems to have been assumed as a convenient approximation where the property fronting on the street was of a kind and not differing much in value, but in Washington avenue it is shown that this mode of valuation is but a substitute for actual assessment. * * * * (365) That the benefits a property owner receives from an improvement can be ascertained only by a reasonable mode of assessment is plain, and that to measure the fronts of all the abutting property and divide the cost by an equal charge per foot front upon each, is not an assessment of advantages, but simply an arbitrary mode of charging, is equally plain. * * * (367) A fixed sum to be paid per foot without regard to the character of the value or extent of the property is an exaction, not a just assessment according to benefits."

Seely vs. Pittsburg, 82 Pa. St., 360, 364.

"The judgment in the Seely case, in view of the facts, must be admitted to be right by all, except those who ascribe a practically omnipotence to the legislative power in such matters—a view which overlooks the substantial difference between general taxation and the imposing of a special burden upon particular property, irrespective of political or municipal districts.

2 Dill., Mun. Corp., Sec. 762.

When an assessment for the improvement of a highway running through a country district, the court say, (page 587:) "While districts may be created and taxation imposed according to the value of the property within the particular district

for the construction of turnpikes and other improvements upon the idea of benefits derived, we are aware of no rule or principle of taxation that would authorize the taxation of agricultural lands by the square foot, or of compelling those who own land bordering on an ordinary country road to incur the entire expense of keeping the road in repair, and certainly no system exists by which such extraordinary expenditures can be made as in this case, imposing a burden of fifty dollars an acre on agricultural land for the construction of an improvement, for no other reason than that the land borders upon the improvement made. The road is devoted to the public use; it is an improvement in which the whole public is interested and where the owners of the adjacent land, although not touching the road, are equally benefited with those living directly upon it. The few living adjacent to the improvement have been selected to discharge a burden that should be assumed by all, or at least by those who are benefited by it. It is a local tax for a county purpose, a common burden imposed on a few, that violates every principle of just and uniform taxation and borders on spoilation * * * * The burden may be apportioned according to the benefits received, whether it be a county or district tax, but such an unjust designation as has been made in this case, and that would exist if a like system had been adopted for the entire county, is in direct violation of the constitution, and an appropriation of the property of the citizen for public use without just compensation. Local taxation is often proper because of the local benefits received. * * * But to say that a few persons living on a road shall pay twenty-thousand dollars for improving it, and then have no other interest in it than his neighbor who rides over it and uses it, is so obviously unjust as to require only the statement to show that it is in plain disregard of the rights of these appellants. It may be called a taxing district, but this imparts no efficacy to such legislation where the district, when created, shows that the burden is imposed on a few for the benefit of all. In this consists the wrong done these appellants, and entitles them to the relief sought."

Graham vs. Conger, 85 Ky., 582.

"The commissioners were to ascertain what land within the district of assessment was benefited, and then to apportion and assess the said sum upon such land in proportion to benefits. The assessment when made was declared to be a lien upon the land, and its payment could be enforced by a sale thereof. I am of opinion that the constitution sanctions no law imposing such an assessment without a notice to and a hearing or an opportunity for a hearing by the owner of the property to be assessed. * * * It matters not, upon the question of the constitutionality of such law, that the assessment has in fact been fairly apportioned. The constitutional validity of a law is to be decided not by what has been done under it, but what may by its authority be done. The legislature prescribe the

kind of notice and the mode in which it shall be given, but it cannot dispense with all notice. * * * * * * *
(190) Can it be that when the public takes land for a public highway the owners thereof are entitled to a hearing as to the compensation which they are to receive, and yet that the lands on both sides of the highway may be assessed to pay such compensation to their entire value, without any opportunity on the part of the owners to be heard? The legislature can no more arbitrarily impose an assessment for which property can be taken and sold, than it can render a judgment against a person without a hearing. It is a rule founded on the first principles of natural justice, older than written constitutions, that a citizen shall not be deprived of his life, liberty or property without an opportunity to be heard in defense of his rights, and the constitutional provision that no person shall be deprived of this 'without due process of law,' has its foundation in this rule. This provision is the most important guaranty of personal rights to be found in the federal or state constitution. It is a limitation upon arbitrary power, and is a guaranty against arbitrary legislation." * * *

Stuart vs. Palmer, 74 N. Y., 183, 188.

"It will be perceived at once that this ordinance is fatally defective. It assumes there is property which will be specially benefited to the extent of this very large assessment, although the town has taken no measure to ascertain that fact, but arbitrarily directs the imposition of this sum as a tax upon property benefited, though it might well be that the aggregate of all special benefits to be derived from the improvement would be but a small fraction of the sum assessed. * * * *
The principle of proportion between different lots was indeed preserved, but that was all. Inasmuch, then, as the ordinance disregards the principle of equality between burden and benefit, and imposes this tax upon the property benefited, though the benefit may be but a fraction of the tax, we must hold it void upon principles well settled in this court."

Greely vs. The People, 60 Ill., 19, 21.

Where the defendant was the owner of a strip of land 11 feet 7 inches wide on the east side of the street, and on the west side of a street of 7 feet 5 inches wide, and the land was assessed for an aggregate sum of three thousand dollars, and the lots, after the paving had been completed, were not worth to exceed one thousand dollars the court say (page 167):

"In considering a question of constitutional protection, the nominal source of the assumed power is of far less moment than the facts of its exercise. The power of taxation is inferred from the general grant of legislative authority, but, like all general grants, it must yield whenever found in conflict with any special restriction. The restriction requiring just compensation when one's property is taken for public purpose is usually ap-

plicable in practice to the power of eminent domain. If, however, in a peculiar state of facts, it shall be found direcly hostile to a certain exercise of the taxing power, or of any other power, the restriction will be supreme and the power must so far be surrendered. * * * (168) It is thus seen that while special remuneration has no concrn with taxation for general purposes, it is indispensable with the theory which sanctions assessments for local improvement. If the special 'remuneration in the way of benefits' be limited, then the improvements are exclusively in the interest of the general public, and the money raised to pay for them is in effect a section of the 'general revenue for the public at large,' levied 'under the guise of local assessments.' This is literally confiscation which is merely a mode forbidden like every other of taking private property for public purposes without just compensation to the owner."

Zoeller vs. Kellogg, 4 Mo. App., 163,

XIII.

The principles applicable to assessments for local improvements, to be deduced from the foregoing authorities, are:

(1) The legislature may create or authorize the municipality to create a local taxing district for local improvement purposes, which includes part only of the property within the municipality, but no land can be included in the assessment district which is not benefited.

(2) Each parcel of contributing property may be assessed only to the extent that it actually receives special benefits.

(3) The taxing district as a whole may be assessed only to the extent of the total sum of the special benefits actually received by the several parcels of contributing property.

(4) The improvement, so far as its costs exceeds the total amount of the special benefit to the municipality at large, and such excess must be borne by the general treasury.

(5) Property owners affected by the improvement within a taxing district are entiled to a hearing on the question of special benefits.

From these principles it necessarily follows:

(a) That the legislature cannot conclusively fix the district, and determine what lands are benefited by the improvement.

(b) That the legislature cannot conclusively determine the

total amount of the benefits to be assessed upon the entire district, or the amount of the benefit to be apportioned to any particular description of land within the district.

(c.) That the legislature cannot make an arbitrary assessment or adopt an arbitrary basis for determining the amount of benefits accruing from a local improvement.

(d) That no assessment of benefits, whether made by the legislature itself or by municipal authorities, under the authority of the legislature, can be sustained, unless the taxpayer is given an opportunity to contest the validity and amount of such assessment and the liability of his property to be assessed for such improvement.

It remains to be seen whether the charter of the City of Detroit is in conflict with these principles.

"The cost and expense of such improvement, except so much thereof as shall be for the work within the lines of intersection of cross streets and alleys, and for the cross-walks at such intersections, and for repaving streets, avenues and highways, shall be assessed ratably according to their extent of front on the lots, parts of lots, or parcels of real estate directly fronting on and within the local assessment district."

Sec. 35, Chapter II., Charter of Detroit.

"The board of assessors shall, when necessary, proceed to make out a list of all the lots or parcels of real estate, constituting a local assessment district, as aforesaid, with the name of the owner or occupant of each lot or parcel of real estate so far as said board can ascertain the same, and also the length of front of each lot or parcel of real estate fronting directly on such improvement. Such board shall then assess the cost and expenses of the work, chargeable as aforesaid upon the property in said list, ratably upon the several lots and parcels of real estate, according to the length of front thereof."

Sec. 37, Chapter II., Charter of Detroit.

Sec. 8, chapter 32, of the ordinances of the City of Detroit, (P. 7), provides that the assessors shall make assessment for paving in accordance with section 37, chapter II., of the charter of the City of Detroit.

The common council of the City of Detroit, in the proceedings for paving Woodward and Blaine avenues, included in the assessment district for paving of each street, the lots and parcels of real estate abutting on that part of the streets paved.

It is expressly alleged in the bill of complaint that "the entire cost and expenses of paving said section of Woodward avenue from Pallister avenue to Joy road, amounting to $55,634.78, except the cost of paving the intersection of streets and

alleys, was assessed upon the property abutting upon said Woodbridge avenue between Pallister avenue and Joy road, including said lot 103, pro rata, according to the frontage thereof on said Woodward avenue, without any regard to the benefits accruing to said several descriptions of property by reason of such grading and paving;" and that "the entire cost and expense of paving said Blaine avenue, from Woodward avenue to Hamilton Boulevard, amounting to eleven thousand four hundred sixty-two dollars and thirty-two cents, ($11,462.32), except the cost of paving the intersection of streets and alleys, was assessed upon the property abutting on said Blaine avenue between Woodward avenue and Hamilton Boulevard, including said lot 103, pro rata, according to the frontage thereof on said Blaine avenue, and without any regard to the benefits accruing to such several descriptions of property by reason of such grading and paving."

These allegations are expressly admitted by the answer. (R., 23.)

So that we have a charter requiring the entire cost of an improvement to be assessed upon the lots abutting on the part of the street paved according to frontage, without any reference to benefits. We have a proceeding of the common council establishing an assessment district in accordance with the provisions of the charter, and it is expressly alleged by the bill and admitted by the answer that these assessments were made upon the property fronting on the street, pro rata, according to the front foot. So that it conclusively appears that the question of benefits was not considered in any way in assessing for this improvement, but that an arbitrary assessment of the entire cost was made on the property, according to frontage, as required by the express provision of the charter.

It is claimed by counsel for plaintiffs in error that the charter provides the taxpayer with sufficient notice and hearing to constitute due process of law.

The only provision in the charter which can be said to provide for any hearing whatever is found in section 37 of chapter II., where, after providing that the property shall be assessed according to frontage, it says:

"When the assessment roll is thus completed, said board shall give notice by at least five publications in the city paper that such roll is completed and will remain in their office for twelve days from the first publication of said notice, for the inspection of all concerned. At the expiration of said twelve days, said board shall, after any needful revision and correction of said roll, sign the same and report it to the common council. Said council may then confirm the same, or may, when it shall deem necessary, refer the same back to said board for further revision or corrections, and when the same shall be so corrected

to the satisfaction of said council, it shall, by resolution, confirm the same."

After the rolls for the assessment on Woodward avenue was made, a notice published which, after giving names of owners appearing on roll, was as follows:

"The common council of the City of Detroit having ordered so much of Woodward avenue, from the north curb line of Pallister avenue to the center line of Joy avenue, to be graded and paved, notice is hereby given that an assessment has been made upon all the lots and premises fronting on said Woodward avenue and liable to be assessed for said improvement under the provisions of the city charter, and that a roll of said assessment is now completed and will remain at the assessor's office in the City of Detroit, from the date hereof until the 4th day of April next, for the inspection of all persons concerned therein."

A similar notice was published in the matter of the paving of Blaine avenue.

The charter provides for no hearing before the common council, or any other body authorized to hear and determine the validity and amount of the assessments for paving. The only object or benefit which could be derived from the inspection would be to see whether the mathematical calculation of frontage, the verification of the apportionment of the cost of the paving upon the several lots according to frontage, and under the express provisions of the charter the council or assessors could make no other correction.

This construction of the charter is confirmed by the proviso contained in section 35 of chapter II., which is as follows:

"Provided, that if the assessment made on any such lot or other parcel of land shall, by reason of its triangular or other irregular shape, seem to the common council to be inequitable, said council may direct a just portion of such assessment to be paid from the general road fund."

This provision, which expressly gives the common council authority to make a deduction in the assessment under certain circumstances, by implication, prohibits the exercise of that power by the council except in the cases specified.

Dwarris on Statutes, 72.

In a case where a charter which required the cost of paving to be assessed according to foot front, and provided for the publishing of the following notice: "Persons owning property on (street) are hereby notified that the roll of ownership showing the amount of the special assessment tax levied against the owners of property above referred to, to cover the cost of improvement made in accordance with the resolution of the city council relating to the same, adopted (date), has been placed in the office of the city secretary for inspection in order that all persons interested therein, or to be affected thereby, may have an opportunity of calling the attention of the city council to any

errors or mistakes connected with such assessments levied against property owned by them as shown in said rolls." The charter also provided that within ten days after the first publication of the notice, the property owner may "by a petition to the city council, filed with the city secretary, object to any such acts and proceedings, and show wherein they have been or may be wronged or injured thereby, and to ask for a revision or correction of the same. And they shall be permitted, and it shall be their duty before the final approval of such roll, to appear in person or by agent or attorney, before said city council, and not thereafter at any time before any other tribunal, * * * * and apply for redress for such wrong or injury and for the correction of such errors as they may point out and establish to the satisfaction of said council."

The court say: "The foregoing provision of the charter authorized the property owner to call upon the city council to revise and correct errors committed in the proceedings had in assessing the cost of the improvement against his property, but it does not empower the council to do anything that it or its officers could not have done in the first instance. The words 'revision' and 'correction' mean that the council may be called upon to review that which had been done and to make the proceedings conform to the law. (Citation.) The city council, and the officers acting under the authority of the charter of the city of Houston, having no power in the first instance to consider the question of benefits in fixing the amount to be charged against Mrs. Hutchinson's property, a revision and correction of the acts done could not give relief against the wrong complained of."

Hutchinson vs Storris, 92 Tex 685

A statute similar to this was before the Circuit Court of the United States for the District of Indiana, the court say: "It is clear that the statute under which the present proceedings are prosecuted, provides that the entire cost of a street improvement, except for street and alley crossings, shall be assessed against the abutting property by the frontage measurement, without any regard to the special benefits received by it. It provides for no notice and hearing to ascertain and determine the actual benefits specially received by the land owner by reason of such improvement. The only notice and hearing provided for is one to revise and correct the report and estimate of the engineer so as to make it conformable to the basis of assessment prescribed in sections 3, 4 and 6."

Charles vs. City of Warren, 100 Fed. R., 538,

It is suggested that the legislature in adopting the foot-front rule for the making these assessments investigated the facts and in the exercise of its discretion determined that this was an equitable method of apportioning the cost of the improvement.

The provision of the charter of Detroit authorizing the assessment of paving by front foot has been in force for upwards of forty years, and while it provides for the mode of assessment, it confers upon the common council unlimited power to make such pavement as they see fit, no matter how expensive it may be, and the cost of the pavement is to be assessed upon the property.

Unless the legislature is endowed with the omniscience of deity, they could not possibly know beforehand what kind of pavement was to be laid, or what the cost of the pavement would be, or that the property assessed would be worth the amount of the assessment; and therefore it could not have used any discretion in the matter at all.

It is elementary law that officers who have a discretion, must exercise that discretion in each case, when an arbitrary rule adopted the proceedings are void as an abuse of discretion.

It must appear from the act itself that the legislature exercised its judgment upon these questions which form the fundamental basis of an assessment. No valid tax should be levied for such purpose except upon the theory that the property was by so much increased in value. In fixing this arbitrary rule to be applied in all cases, under all conditions, for an indefinite time, without opportunity for a hearing or review, is it not self-evident that the legislature did not consider the questions of benefits at all? To our mind the act is so drastic and arbitrary as to show upon its face a complete failure to exercise any judgment whatever upon that question."

County of Ramsay vs. Lewis, Mo. Rep'r.
(Decided, Feb. 7th, 1901.

In any view of the case we cannot see how these provisions of the charter can be reconciled with the rights of defendant under the constitution of the United States, and therefore the charter, being in conflict with the constitution, must be held to be void.

XIV.

The defendant in error was not a petitioner for the improvement, and his silence or delay in objecting to the proceedings, cannot in any way prejudice his rights.

Both of these streets are public highways, under the control of the City of Detroit, and the charter expressly provides that the common council may "provide for working and improving all highways, streets, avenues, lanes, alleys and public places within said city, and may assess and levy upon the taxable

property within said city and may expend such highway taxes therefor as may be necessary."

CHAPT. 7, SEC. 33, CHARTER OF THE CITY OF DETROIT.

Under this provision of the charter, the common council had full power to improve and repair the streets. There was no way by which the complainant could have prevented the paving of these streets even if he had so desired. As the charter authorizing the assessment of these paving taxes upon the property was unconstitutional, he was bound to take notice of such unconstitutionality, and would know that there could be no charge made upon his land for such paving, and his mere silence could not in any event estop him from setting up the fact that the statute was unconstitutional and the assessment void.

"When a statute is unconstitutional, it is as if it had never been. Rights cannot be built up under it; contracts which depend upon it for their consideration are void; it constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made. And what is true of an act void in toto is true also as to any part of an act which is found to be unconstitutional, and which consequently is to be regarded as having never at any time been possessed of any legal force."

Cooley's Const. Lim., 224.

"An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is in legal contemplation as inoperative as though it had never been passed."

Norton vs. Shelby County, 118 U. S., 425, 442.

"The finding of the court in this case is that Mary J. Agler was not a petitioner, and that she remained silent until the improvement was made and the bonds of the city for the payment of the same had been negotiated; yet that she had knowledge that the improvement was being made at the time thereof. It is also found that her property was benefited by the improvement to the extent of four dollars per front foot and no more. We think the judgment in this case should be affirmed. The act under which the proceedings for the improvement were had was invalid. * * And she was in no way a promoter of the same. * * * Neither the city in causing the work to be done, nor the contractor in doing it, were trespassers as to her, although the proceedings were invalid. The title to the street was in the city, not in her. Its improvement was no injury to her and she could not prevent it by any proceeding she could adopt, as she might have done, had it been an improvement upon her own land. She was not called on to do

anything until steps were taken to make the assessment upon her property."

Columbus vs. Agler, 44 O. St., 486.

Where suit is brought to enjoin the collection of taxes for paving a street, and it was alleged in the answer that the plaintiff had knowledge of and acquiesced in the improvements, the court say (page 44:) "The law under which these taxes were attempted to be levied and collected has been by the supreme court of this state declared unconstitutional. It, therefore, can have no operation. An unconstitutional act is not a law. It confers no rights, it imposes no duties, it affords no protection, it creates no office. It is in legal contemplation as inoperative as though it had never been passed."

Wyandotte Co. vs. Kansas City &c. Ry. Co, 5 Kas., App. 43.

XV.

Where the basis of an assessment is illegal, as in this case, it is not necessary as a condition of relief being granted to complainant, to tender any sum as representing what might be the excess of cost over any benefits accruing to the property.

In *Norwood vs. Baker*, 172 U. S., 269, the Court say, (page 291.) "The assessment was by the front foot and for a specific sum representing such cost, and that sum could not have been reduced under the ordinance of the village, even if proof had been made that the cost and expense assessed upon the abutting property exceeded the special benefits. The assessment was in itself an illegal one, because it rested upon a basis that excluded any consideration of benefits. A decree enjoining the whole assessment was therefore the only proper one. Nor is the present case controlled by the general principle announced in many cases, that a court of equity will not relieve a party against an assessment for taxation unless he tenders or offers to pay what he admits or what is seen to be due. * * * (293) The present case is one in which, as in most of the cases brought to enjoin the collection of taxes or enforcement of special assessments, it cannot be plainly or clearly seen from the showing made by the pleadings that a particular amount if no more is due from the plaintiff, and which amount be paid or tendered before equity would interfere. It is rather a case in which any assessment is illegal. In such a case it was not necessary to tender as a condition of relief being granted to the plaintiff, any sum as representing what she supposed or might guess, or was willing to concede, was the excess of cost over any benefits accruing to the property. She was entitled, with-

out making such a tender, to ask the court of equity to enjoin the enforcement of a rule of assessment that infringed upon her constitutional rights. In our judgment, the circuit court properly enjoined the enforcement of the assessment, as it was, without going into proofs as to the excess of the cost of opening the streets over special benefits."

Norwood vs. Baker, 172 U. S., 269, 291.

In *Hayes vs. Douglass County*, 92 Wis., 429, where a suit was brought to set aside paving assessments, the court say, (page 444:) "Because the defects go to the very foundation of the assessment, and make it necessarily unequal, the plaintiff is not required to pay his proportion of the assessment as a condition of relief."

Hayes vs. Douglass Co., 92 Wis., 429.

"It is urged by defendant that the plaintiff should but did not show the excess of taxes over which she would have been obliged to pay had she been legally and properly assessed. Such undoubtedly is the general rule. But where the illegalities are such that it is impossible to ferret out the legal from the illegal taxes which the taxpayer should pay, the rule does not apply."

Solomon vs. Oscodo, 77 Mich., 365, 368.
Aud. Gen. vs. Prescott, 94 Mich., 190.

XVI.

It must be borne in mind that the question in this case is distinctively a federal question, and that cases decided by state courts under the peculiar provisions of state constitutions, as well as all cases decided prior to the adoption of the fourteenth amendment to the constitution of the United States, can have no weight in the the decision of this case.

It will be observed that in the cases decided in New York, as well as most of the other states, the decisions are expressly based upon the ground that there are no provisions in the state constitutions which limit the power of the legislature in respect to taxation; while the question in this case is as to the effect of the fourteenth amendment upon the powers of the legislature in regard to special assessments.

Since the decision in *Norwood vs. Baker*, the supreme courts of the states of Massachusetts, Texas, Indiana and Minnesota, together with the United States circuit courts in New York, Indiana, Missouri, Ohio, Georgia, Washington and Michigan, have applied the principles in that case to paving assessments, and have held assessments made under charters similar to the charter in this case to be within the principles of that

decision, and void; while the supreme courts of Michigan, Missouri and North Dakota have declined to follow the decision in *Norwood vs. Baker*, for the alleged reason that the facts in the Norwood-Baker case were different from those in the cases mentioned, and that therefore, the principles announced in that decision are not applicable in a paving case.

The distinction attempted to be made by these courts between the decision in the case of *Norwood vs. Baker*, and paving cases where the assessment is made by an arbitrary method, cannot be sustained. While that case was a street opening case, still, after the amount of the damages for taking the land had been finally ascertained, the assessment of those damages upon the property benefited would be made in the same manner and governed by the same principles as the assessment for any other street improvement.

The case at bar is a good illustration of the inequity of the rule for front foot assessments. The property is a corner lot, facing and having a frontage on Woodward avenue of sixty-nine feet. Woodward avenue, as appears by the testimony, is one of the main thoroughfares in the City of Detroit, and practically a boulevard. It extends from the Detroit River north, through the City of Detroit and the village of Highland Park, about six miles, to a park belonging to the City of Detroit, known as "Palmer Park." This street was paved by the common council with asphalt pavement seventy feet wide, and the entire cost of the paving was assessed upon the property abutting on the street *pro rata* according to foot front, the cost amounting to between seven and eight dollars per foot.

For all purposes of the persons living on this street, a thirty foot pavement would have been just as beneficial to the property as the pavement which was made, but for the public convenience in traveling over this street from the city to the park, the street was paved seventy feet wide, in order to give wide driveways on each side of the street railway tracks.

This lot extends back along said Blaine avenue two hundred feet, with a depth on Blaine avenue of sixty-nine feet, while all the lots lying west of this lot on Blaine avenue are one hundred twenty-seven and one-half feet deep, and front on Blaine avenue. So that the benefit to defendant's lot by the paving of Blaine avenue is small as compared with the benefit to those lots which front on Blaine avenue and use the same for travel; yet under this arbitrary assessment defendant's lot is assessed the same amount per foot front as the lots which face upon the street.

It is not true, as claimed by the plaintiff in error, that property is alwaye benefited by the paving in front of it. A lot may be so situated that the paving and grading of the street will require the filling in or the cutting down of the lot so as to meet the grade at an expense greater than the cost of the pavement or the value of the lot, and it is then in such cases that the lot would not be benefited by the paving.

A special assessment for paving, to be valid, can only be made after a full hearing and investigation of the facts relating to the paving and to each specific piece of property to be assessed, and which investigation the taxpayer is entited to be present and be heard. "What seems to be the most equitable and just method of attaining the uniformity and equality in the apportionment of local assessments is, that by which each piece of property after being viewed by assessors or commissioners, or other officers appointed for the purpose, is assessed according to the benefits which, in their judgment, such property will receive from the improvement."

Cooley on Taxation, 522.

This is the first time, with the exception of the case of *Norwood vs. Baker*, when the question of special assessments has come before this court as a distinctively federal question. The authorities are conflicting, the old cases holding that the legislature has absolute power in the matter of taxation, the later cases holding that the legislature has not absolute power, but that the party is entitled to a hearing on all the questions involving the validity and amount of the assessment.

It would seem that the later cases are based upon the correct principle governing special assessments, and are in full accord with the constitutional rights of the citizen.

We submit, that the judgment of the court below should be affirmed.

ELBRIDGE F. BACON,
Counsel for Defendant in Error.

See over for
Corrections

Office Supreme Court
FILED
MAR 27 1901
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Clerk

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Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 411.

THE CITY OF DETROIT, THOMAS M. LUCKING, AND WILLIAM B. THOMPSON, APPELLANTS,

vs.

RALZEMOND A. PARKER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

CORRECTIONS IN BRIEF OF DEFENDANT IN ERROR.

The citation from *Detroit vs. Judge of Recorder's Court, 112 Mich., 588 and 598*, on page 26 of brief, should read as follows:

"The jury are required to assess one-half upon the assessment district, regardless of whether it is benefited to that extent, and are clothed with power to assess a larger amount only when they conclude that the benefit exceeds fifty per cent. The legislature has *no* power to fix an arbitrary percentage of a public improvement to be imposed upon a local assessment district, regardless of the benefits received."

The case of *Minnesota vs. Pillsbury*, cited on pages 26 and 35 of the brief, will be found reported in the 85th N. W. Reporter, page 175.

The case of *County of Ramsey vs. Lewis*, cited on pages 3[illegible] and 46 of brief, will be found reported in 85th N. W. Reporter, page 207.

ELBRIDGE F. BACON,
Counsel for Defendant in Error.